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Advies inzake De latere overeenstemming en latere praktijk met betrekking tot de interpretatie van verdragen

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ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW

ADVISORY REPORT ON

**Subsequent agreements and subsequent
practice in relation to the interpretation of
treaties**

ADVISORY REPORT NO. 30

THE HAGUE

NOVEMBER 2017

List of abbreviations

UNGA	United Nations General Assembly
CAVV	Advisory Committee on Issues of Public International Law
HRC	Human Rights Committee
ILC	International Law Commission
ICCPR	International Covenant on Civil and Political Rights
UN	United Nations
WHO	World Health Organisation
YBILC	Yearbook of the International Law Commission

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1. Introduction

In his letter of 27 March 2017 the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (the Committee) to prepare an advisory report on the draft conclusions of the International Law Commission (ILC)¹ of the United Nations on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as adopted on first reading. These draft conclusions deal with the meaning of article 31, paragraphs 3(a) and 3(b) of the Vienna Convention on the Law of Treaties of 1969 (the Vienna Convention) and the conditions on which they may be applied.²

The Committee has the honour to submit the following advice to the Minister and hopes that its findings will aid the contribution to be made by the Netherlands to the follow-up debate on the draft conclusions.

2. General remarks

The Committee takes a generally positive view of the draft conclusions and would therefore like to express its appreciation for the ILC's work to date.

2.1 Status of positions taken by the International Law Commission

The first question that arises in connection with the ILC's project on subsequent agreements and subsequent practice³ in relation to the interpretation of treaties is what relevance or weight should be given to its conclusions. This is an issue which the ILC itself has not addressed.

Many different factors play a role in determining what significance may be attached to the work of the ILC:

- As a subsidiary organ of the General Assembly, the ILC helps to implement the General Assembly's task under article 13, paragraph 1(a) of the Charter of the United Nations of encouraging the progressive development of international law and its codification.
- The composition of the ILC, the position of its members (who function as independent

¹ The ILC was established by the United Nations in 1948 and is formally a subsidiary organ of the United Nations General Assembly (UNGA). The ILC has its permanent seat in Geneva and currently has 34 members. It assists the General Assembly in implementing article 13 of the UN Charter, on the basis of which the General Assembly makes recommendations for the development of international law and its codification.

² Annexe II to this advisory report contains the ILC's draft conclusions as adopted on first reading. Unless stated otherwise, all references to pages and sections in this report relate to UN document A/71/10, in which the text of the draft conclusions and the commentary are contained on pages 120-240.

³ In the original Dutch text of this advisory report the Committee has chosen to use the term 'praktijk' (practice) rather than 'gebruik' (use), which is the term employed in the Dutch translation of the Vienna Convention (article 31, paragraph 3(b): "ieder later gebruik in de toepassing van het verdrag waardoor overeenstemming van de partijen inzake de uitlegging van het verdrag is ontstaan"). This is because the term 'praktijk' seems to be closer to the English text of article 31, paragraph 3(b) of the Vienna Convention ('any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation').

experts), the position of the special rapporteur and the reaction of the ILC's members to the work of the rapporteur.

- The stage which the work of the ILC has reached. Needless to say, greater weight must be given to the final conclusions of the ILC as a whole than to the individual reports of the special rapporteurs.
- The comments of States on the work of the ILC in its various stages and the manner in which the ILC has taken account of these comments.
- The extent to which the ILC considers there is codification or progressive development of international law. After all, the ILC's task is not confined to codification of existing international law; a text may also contain elements *de lege ferenda*.

It would therefore seem reasonable to conclude that – given the stage of the study and the incorporated reactions of States – significance can be given to the work of the ILC as a special form of ‘subsidiary means for the determination of rules of law’ within the meaning of article 38(1)(d) of the Statute of the International Court of Justice. It follows that, in general, greater weight should be attached to the work of the ILC than to that of the *Institut de Droit International* (IDI), the International Law Association (ILA) or the work of individual writers.

2.2 Consultation with the competent organs of the United Nations in accordance with article 25 of the Statute of the International Law Commission

One of the functions of the Secretary General of the United Nations is to act as depositary of multilateral treaties.⁴ This function is discharged by the Office of Legal Affairs (Treaty Section) of the United Nations Secretariat. It is apparent from the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*⁵ that the depositary has extensive experience of matters of interpretation, particularly as regards the application of the final clauses of treaties. In addition, the Office of Legal Affairs is often consulted by UN member States about more general aspects of the interpretation of treaties. The ILC's report makes no reference whatever to the opinions published in the United Nations Juridical Yearbook (e.g. 1967 and 2004), although secretariats of multilateral treaties regularly seek the opinion of the head of the Office of Legal Affairs (UN Legal Counsel) on the interpretation of treaties.⁶ These opinions are, in practice, treated as authoritative. The Committee therefore considers that it would be advisable for the ILC, in accordance with article 25 of its Statute, to consult the Office of Legal Affairs, in particular the Treaty Section of the Secretariat, as a competent organ on this topic.

⁴ Article 98 of the Charter of the United Nations, resolution 24(1) of 12 February 1946 of the General Assembly.

⁵ See <https://treaties.un.org/doc/source/publications/practice/summary_english.pdf>.

⁶ See also footnote 872 on page 208 of the ILC's report.

2.3 Good faith and manifest misapplication of a treaty

The ILC states several times in its report that a ‘manifest misapplication of a treaty, as opposed to a *bona fide* application (even if erroneous), is therefore not an “application of the treaty” in the sense of articles 31 and 32’ (report pp. 142-143 § 19; see also p. 151 § 8). The Committee regards this position as somewhat problematic. Naturally, treaties have to be applied and interpreted in accordance with the principle of good faith (articles 26 and 31(1) Vienna Convention). At the same time, every application of a treaty presupposes a given interpretation of the terms of the treaty and their legal implications (the existence and scope of obligations and rights). The wording used by the ILC, namely ‘a manifest misapplication’, seems to suggest that it is relatively easy to determine whether a given application of a treaty is incorrect, but in many cases this requires extensive and thorough interpretation of the treaty in accordance with the general rule of article 31 of the Vienna Convention. The aim of article 31, paragraph 3(b) of the Vienna Convention is to allow examination of whether practice in the application of a treaty reflects an interpretation supported by *all parties to the treaty*.⁷ Even if a given practice of a party is disregarded as being ‘a manifest misapplication’ of the treaty, it is still highly unlikely that one could come to the conclusion that an agreement among all parties regarding the interpretation of the treaty exists. The Committee notes that an absence of good faith should instead be assessed on the basis of article 31, paragraph 1 of the Vienna Convention and recommends that greater emphasis should be placed on the aforementioned considerations in the commentary.

⁷ The text adopted by the ILC in 1964 spoke of a practice establishing ‘the understanding of all the parties’, which was altered in 1966 to ‘the understanding of the parties’. According to the explanation given by the ILC, this alteration was intended not to change the rule, but merely to clarify that not every party needed to contribute individually to the relevant practice. See Yearbook of the International Law Commission 1966, Volume II, 221-222 § 15 (commentary on article 27, renumbered as article 31).

3. Remarks on selected draft conclusions

3.1 Draft conclusion 2 on the general rule and means of treaty interpretation

Conclusion 2

General rule and means of treaty interpretation

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.
2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.
3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.
5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

In paragraph 5 of draft conclusion 2 the ILC states that '[t]he interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32'. It adds in the commentary (pp. 125-126 § 3) that articles 31 and 32 of the Vienna Convention must be read together as they constitute 'an integrated framework' for the interpretation of treaties. The Committee would point out that treaty interpretation as 'a single combined operation' is, in principle, limited to article 31 of the Vienna Convention, as also noted by the ILC itself in the commentary (YBILC, Volume II, pp. 219-220 § 8, 1966). This position is also prompted by the decision to treat article 32 of the Vienna Convention, in principle, as optional and hence as a supplementary means of interpretation, since the sole purpose of the elements it contains is to confirm an established interpretation or decide on an interpretation where the meaning would otherwise be ambiguous or the result absurd or unreasonable.

The ILC also states in paragraph 5 of draft conclusion 3 that 'appropriate emphasis' should be placed 'on the various means of interpretation' and refers fairly regularly in its commentary (p. 128 § 7; pp. 130-131 § 12-15; pp. 133-134 § 4; pp. 165-166 § 2; p. 193 footnote 788) to the absence of 'primacy' or 'hierarchy' among the elements of interpretation referred to in article 31, paragraph 1 of the Vienna Convention. The Committee can accept the idea that there is no specific primacy or hierarchy among the

various elements of interpretation. However, it wishes to point out that, in view of the wording used in article 31, a certain weight can be given to the various elements. For example, paragraph 1 of article 31 states that a treaty should be interpreted in accordance with the ordinary meaning to be given to its terms in their context, whereas this is to be done in the light of its object and purpose. Paragraph 3 of article 31 also states that the elements of interpretation it lists should also be taken into account together with the context, without themselves clearly forming part of the context. It follows that article 31 provides a certain ranking of these elements as part of the entire process of interpretation, and that as a result those elements referred to in paragraphs 1 and 2 outweigh, in principle, those mentioned in paragraph 3.

The Committee considers that greater emphasis could be placed on these aspects in the commentary.

3.2 Draft conclusion 4 on the definition of subsequent agreement and subsequent practice

Conclusion 4

Definition of subsequent agreement and subsequent practice

1. A 'subsequent agreement' as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.
2. A 'subsequent practice' as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.
3. Other 'subsequent practice' as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

In draft conclusion 4 the ILC speaks of subsequent practice in the application of a treaty 'after its conclusion'. The ILC explains this (pp. 137-138 § 2-3) and states that the moment of conclusion of a treaty (or determination of its definite text) precedes its entry into force. The ILC motivates this position by saying that it would be hard to think of a reason why a practice that takes place between conclusion and entry into force should not be relevant for the purpose of interpretation.

The Committee considers that by taking this position the ILC may possibly be interpreting the text of article 31, paragraph 3(b) of the Vienna Convention too broadly. The text refers to 'subsequent practice in the application of the treaty', which seems to imply that the treaty has entered into force. This interpretation is certainly supported by the remainder of article 31, paragraph 3(b), which refers to 'the agreement of the parties'. A party is defined in article 2, paragraph 1(g) of the Vienna Convention as 'a State which has consented to be bound by the treaty and for which the treaty is in force'.

Although recognising that State practice before the entry into force of a treaty should be

taken into account, the Committee thinks it would be desirable to specify exactly what situations are envisaged and what the value of the practice is in those cases. A distinction can be made in this connection, for example, between the practice of States which are not yet parties but have already signed the treaty (see also the obligation in article 18 of the Vienna Convention) and earlier practice of States before signing the treaty. The Committee believes that if practice is to be relevant it must in any event be that of States which have signed the treaty in question or have acceded to it before its entry into force. It also seems advisable to note that practice is certainly relevant for the purposes of article 31, paragraph 3(b) if the treaty in question provides for provisional application. However, the Committee wonders whether the parties to a treaty would be bound to take account of State practice when interpreting the treaty concerned if they had signed but not yet ratified it. This could be reflected in the commentary on this draft conclusion.

3.3 Draft conclusion 5 on attribution of subsequent practice

Conclusion 5

Attribution of subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.
2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

In paragraph 1 of draft conclusion 5 the ILC states that practice in the application of a treaty is relevant only if it is attributable to a party to the treaty. More specifically, the ILC indicates in paragraph 2 that other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32 of the Vienna Convention, but may be relevant when assessing the practice of parties to a treaty.

This may be too limited, particularly, for example, as regards the practice of treaty bodies. Although they are dealt with extensively elsewhere, it would be appropriate to include at least one or more cross-references in this draft conclusion.⁸

⁸ The Committee would note in this respect that what is relevant here is not what treaty bodies contribute to a treaty's interpretation as such but the fact that, since they apply the treaty, their application is relevant as practice 'in the application of the treaty'. For example, if the Human Rights Committee (HRC) formulates a general comment, this is an act which applies the ICCPR and is thus relevant to the practice concerning the provision allowing for general comments by the HRC. Ultimately this practice is relevant to the question of whether the treaty parties support the resulting interpretation.

3.4 Draft conclusion 7 on possible effects of subsequent agreements and subsequent practice in interpretation

Conclusion 7

Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.
2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.
3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the 1969 Vienna Convention and under customary international law.

In draft conclusion 7 the ILC expresses its views on the possible effects of subsequent agreements and subsequent practice in the interpretation of a treaty. It states in this connection that '[t]his may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties'. The commentary (p. 165-166 § 2) adopts a rather more restricted approach, as it speaks about clarifying the meaning of a treaty in the sense of narrowing down possible meanings of a particular provision or the scope of the treaty as a whole, confirming a wider interpretation or understanding the range of possible interpretations.

The Committee is concerned about the chosen wording of draft conclusion 7, paragraph 1. By referring to the possibility of widening or narrowing the range of possible interpretations, the ILC seems to be indicating not only that the interpretations can be wider or narrower but also that the parties, by means of subsequent agreements or subsequent practice, can support interpretations that are not based on *possible interpretations* of the wording of the treaty. This suggests that not only interpretations *infra legem* (and possibly also *praeter legem*) but also interpretations *contra legem* are permissible. In the latter case, this would constitute a change or amendment to the treaty rather than an interpretation.

The Committee feels it would be desirable for this to be taken into account in the final wording of this draft conclusion.

In the commentary on paragraph 3 of draft conclusion 7 (pp. 173-180 § 21-37), the ILC deals at length with the modification of a treaty by means of practice and concludes (p. 180 § 38) that 'while there exists some support in international case law that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties theoretically may

lead to modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts prefer to make every effort to conceive of an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way.’ The Committee can agree with this position.

The reasoning (p. 180 § 38) concerns only the ‘agreed subsequent *practice* of the parties’ (italics added by the Committee) in the sense of article 31, paragraph 3(b) of the Vienna Convention and does not cover subsequent agreements as referred to in article 31, paragraph 3(a) of the Vienna Convention. However, the wording of draft conclusion 7, paragraph 3 is also based on a presumption ‘that the parties to a treaty, *by an agreement subsequently arrived at* or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it’. The following sentence, which states that the possibility of amending or modifying a treaty ‘by subsequent *practice* of the parties has not been generally recognized’, therefore does not relate to the modification or amendment of a treaty by ‘*an agreement subsequently arrived at*’ (italics added by the Committee). On the contrary, article 39 *et seq.* of the Vienna Convention explicitly confirm the right of the parties to amend a treaty.

It therefore seems to the Committee to be doubtful whether there should be a presumption that where the parties to a treaty reach subsequent agreement among themselves they do not intend to amend or modify the treaty, particularly where such subsequent agreement is recorded in legally binding form.

3.5 Draft conclusion 10 [9] on agreement of the parties regarding the interpretation of a treaty

Conclusion 10 [9]

Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.
2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

The second sentence of paragraph 1 of draft conclusion 10 [9] provides that an agreement between the parties about the interpretation of a treaty ‘need not be legally binding’. That may be the case, but the question is whether the binding or non-binding character of the agreement between the parties does not affect the interpretation of the treaty. Whereas a non-legally binding agreement between parties regarding the interpretation of a treaty should be regarded as one of the various factors which play a role in the interpretation process, the Committee considers that where there is a legally binding agreement between the parties about the interpretation of a treaty, the matter should, in principle, be treated as

settled. In the Committee's view, the commentary on this draft conclusion should deal with this issue explicitly.

3.6 Draft conclusion 11 [10] on decisions adopted within the framework of a conference of parties

Conclusion 11 [10]

Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.
2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.
3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

Paragraph 3 of draft conclusion 11 [10] raises questions concerning the requirement of 'agreement in substance' and the phrase 'including by consensus'.

The ILC assumes in its report that in all circumstances covered by paragraph 3(a) of article 31 of the Vienna Convention there must be an 'agreement *in substance* between the parties regarding the interpretation of a treaty' (italics added by the Committee). However, paragraph 3(a) of article 31 of the Vienna Convention does not contain the words 'in substance'. Paragraph 3 of draft conclusion 11 [10] provides that it may concern a decision of a conference of parties 'regardless of the form and the procedure by which the decision was adopted'. This leaves open the possibility that the decision-making rules of the conference of parties allow for a decision to be adopted by a given majority of votes. Whether or not such a decision is legally binding on the parties is once again determined by the decision-making rules of the conference of parties. As the ILC itself indicates in its report, however, the agreement between the parties need not necessarily be of a legally binding nature. A decision adopted in this way could also concern the interpretation of a treaty. Although there are sound arguments under international institutional law for not attaching importance to the voting ratio when determining whether there is an international decision, the ILC's commentary suggests that article 31, paragraph 3(a) of the Vienna Convention excludes this possibility as it too requires the agreement of *all* parties to the treaty concerning an interpretation. The commentary on the draft conclusion could deal with this divergence, taking into account the various scenarios that can have a bearing on

the possible validity of an interpretation in the light of article 31, paragraph 3(a) of the Vienna Convention, namely whether or not there is consensus among the parties and whether or not there is an ‘agreement in substance’.

3.7 Draft conclusion 12 [11] on constituent instruments of international organisations

Conclusion 12 [11]

Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.
2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.
3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.
4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

In its commentary (p. 226 § 36 and footnote 965) the ILC states that practice of an international organisation can only be relevant for the interpretation of its constituent instrument if that organisation is competent, since it is a general requirement that international organisations do not act *ultra vires*. As noted above in relation to good faith and (manifest) misapplication of a treaty, whether an act is assessed as *intra vires* or *ultra vires* depends on how the constituent instrument is interpreted. Another relevant factor here, as quoted in the footnote mentioned above, is the ruling of the International Court of Justice (ICJ) that there is a presumption that action to fulfil one of the stated purposes of the organisation is not *ultra vires*. The Committee considers it would be desirable for the commentary to give greater prominence to this point.

After noting that few constituent instruments contain explicit procedural or substantive rules regarding their interpretation, the ILC notes in its commentary (pp. 227-228 § 40) in connection with the issue of special rules of interpretation, that ‘[s]pecific “relevant rules” of interpretation need not be formulated explicitly in the constituent instrument; they may also be implied therein, or derive from the “established practice of the organization”.’

The Committee considers this to be a very far-reaching assertion by the ILC, and wonders whether some qualification might not be appropriate. In the absence of explicit rules in a treaty, it should be assumed that the general rules of treaty interpretation apply. This is also apparent from article 5 of the Vienna Convention, which provides that constituent instruments come under the operation of the Vienna Convention. Therefore, in the absence of explicit rules in a constituent instrument, it should be assumed that the general rules of

treaty interpretation apply. Moreover, the case law of the ICJ, in particular in its opinion requested by the WHO, gives no grounds whatever for assuming that specific rules of this kind exist. If implicit powers or ‘established practice’ are to serve as the basis for this assertion, more thorough argumentation is not merely desirable but essential.

3.8 Draft conclusion 13 [12] on pronouncements of expert treaty bodies

Conclusion 13 [12]

Pronouncements of expert treaty bodies

1. For the purpose of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.
2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.
3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.
4. This draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty.

The Committee broadly agrees with what is said in draft conclusion 13 [12] about the significance of pronouncements of expert treaty bodies for the interpretation of treaties.

The second sentence of paragraph 3 of the draft conclusion states, among other things, that: ‘Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.’ § 18 of the commentary on the draft conclusion states that: ‘Paragraph 3, second sentence, does not purport to recognize an exception to this general rule [i.e. § 2 of draft conclusion 10 [9], addition by the Committee], but rather intends to specify and apply this rule to the typical cases of pronouncements of expert bodies.’ The general rule set out in paragraph 2 of draft conclusion 10 [9] is that: ‘Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.’

The ILC therefore appears to adopt the same approach in relation to the silence on the part of one or more parties, irrespective of whether this silence relates to the determination of a position or practice of one or more *parties to a treaty* or to *pronouncements of expert treaty bodies*. The Committee wonders whether this lack of a distinction on this point is correct.

Paragraph 4 of draft conclusion 13 [12] reads: ‘This draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty.’ According to the commentary, this paragraph is the neutral

product of two irreconcilable strands of opinion among ILC members. § 27 of the commentary on the draft conclusion states that: ‘Ultimately, the Commission decided to limit itself, *for the time being*, to formulating, in paragraph 4 of draft conclusion 13 [12], a without prejudice clause. *The matter may be taken up again on second reading, in light of the views expressed by States*’ (italics added by the Committee). The Committee can accept the chosen wording (‘without prejudice to’).

ANNEXES

Request for advice of 27 March 2017 on the draft conclusions adopted by the International Law Commission (ILC) on subsequent agreements and subsequent practice in relation to the interpretation of treaties

Draft conclusions of the International Law Commission on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as adopted on first reading (chapter VI of the ILC report of 2016, doc. no. A/71/10)

Members of the Advisory Committee on Issues of Public International Law

Annexe I

Request for advice of 27 March 2017 on the draft conclusions adopted by the International Law Commission (ILC) on subsequent agreements and subsequent practice in relation to the interpretation of treaties

Professor R.A. Wessel
Chair
Advisory Committee on Issues of Public International Law

Date: 27 March 2017
Re: Request for advice on the ILC's conclusions

Dear Professor Wessel,

I would kindly request the Advisory Committee on Issues of Public International Law to produce two separate reports on the draft conclusions on the identification of customary international law, adopted by the International Law Commission during its sixty-eighth session (chapter V of the ILC report of 2016, doc. no. A/71/10) and its draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted during the same session (chapter VI of the ILC report of 2016, doc. no. A/71/10). Please find the draft conclusions enclosed with this letter.

I expect that these two reports by your Committee will add considerable value to the Dutch commentary on the draft conclusions.

It would be desirable for your report on the identification of customary international law to include the role of the Dutch courts.

I should be grateful to receive the two reports from your Committee by 1 November 2017 at the latest.

Yours sincerely,

Bert Koenders
Minister van Buitenlandse Zaken

Annexe II

Draft conclusions of the International Law Commission on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as adopted on first reading (chapter VI of the ILC report of 2016, doc. no. A/71/10)

Annexe III

Members of the Advisory Committee on Issues of Public International Law

Members of the Advisory Committee on Issues of Public International Law

Chair

Professor R.A. Wessel

Vice-Chair

Professor L.J. van den Herik

Members

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The Committee on Issues of Public International Law is an independent body that advises the government and parliament on international law issues.